



SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Geoffrey Robertson
Justice Raja Fernando

Registrar: Robin Vincent

Date: 25 May 2004

PROSECUTOR Against MOININA FOFANA
(Case No. SCSL-2004-14-AR72(E))

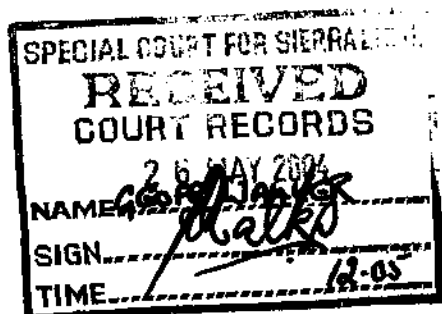
DECISION ON PRELIMINARY MOTION ON LACK OF JURISDICTION: ILLEGAL
DELEGATION OF JURISDICTION BY SIERRA LEONE

Office of the Prosecutor:

Desmond de Silva QC
Luc Côté
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Defence Counsel:

Michiel Pestman
Victor Koppe
Arrow John Bockarie
André Nollkaemper
Liesbeth Zegveld



THE APPEALS CHAMBER of the Special Court for Sierra Leone (“Special Court”);

SEIZED of the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (“Preliminary Motion”) filed on behalf of Moinina Fofana (“Accused”) on 14 November 2003;¹

NOTING that the Prosecution filed its Response on 21 November 2003² and that the Defence filed its Reply on 30 November 2003³;

NOTING that the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence (“Rules”) on 3 December 2003;

NOTING that Additional Submissions pursuant to Rule 72(G) were filed by the Defence on 6 January 2004⁴, that the Prosecution filed its Response to the Additional Submissions on 20 January 2004⁵ and that the Defence filed its Reply to the Prosecution Response on 26 January 2004⁶;

NOTING the Decision of the Appeals Chamber (composed of Justice Winter, Justice King and Justice Ayoola) on Challenge to Jurisdiction: Lomé Accord Amnesty in the Kallon and Kamara cases of 13 March 2004 (“Lomé Amnesty Decision”);

NOTING the Decision of the Appeals Chamber on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court in the Gbao case of 25 May 2004 (“Decision on the Invalidity of the Agreement on the Establishment of the Special Court”);

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;

HEREBY DECIDES:

¹ This Preliminary Motion was filed under Case No. SCSL-2003-11. Following the Decision and Order on Prosecution Motions for Joinder of 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number of 3 February 2004, it has been assigned the new case number referred to herein.

² Prosecution Response to the Defence Preliminary Motion Based on Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 21 November 2003 (“Prosecution Response”).

³ Defence Reply to the Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 30 November 2003 (“Defence Reply”).

⁴ Additional Defence Submission Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 6 January 2004.

⁵ Prosecution Rule 72(G)(ii) Response to the Defence Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 20 January 2004.

⁶ Defence Reply to the Prosecution Response to the Additional Written Submission Pertaining to the Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 26 January 2004.

I. DISCUSSION

1. The Defence frames its submissions around the following main points:
 - a) An international court that is established by treaty does not acquire new rights and powers but is rather an institution that exercises rights and powers that were already possessed by the states that created it.⁷
 - b) It is a well-established principle of international law that states can only transfer powers they actually possess.⁸ By agreeing to Article IX of the Lomé Accord, Sierra Leone granted absolute and free pardon to the Accused and as a consequence, Sierra Leone gave up its right to exercise its personal jurisdiction over the Accused.⁹ The jurisdiction of Sierra Leone over the defendant was thus unlawfully transferred to the Special Court by Sierra Leone.¹⁰
 - c) The Lomé Accord is a treaty under international law.¹¹

In its Reply during the 'additional submissions' phase following the referral of the Preliminary Motion to the Appeals Chamber, the Defence urges the Appeals Chamber to hold an oral hearing.¹²

2. The Prosecution submits that the Lomé Accord could not have deprived Sierra Leone of its capacity to enter into an agreement for the establishment of an international criminal court. According to the Prosecution, the Lomé Accord is not a treaty under international law, but an agreement signed between two national bodies¹³, and there is a crystallising international norm

⁷ Defence Motion, para. 7.

⁸ Defence Motion, paras 7-11.

⁹ Defence Motion, para. 12.

¹⁰ *Prosecutor v. Moinina Fofana*, Case No.SCSL-2003-11-PT, Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 14 November 2003 ("Defence Motion"), para. 2.

¹¹ Reply to the Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdictions by Sierra Leone, 30 November 2003, paras 3-11.

¹² *Prosecutor v. Moinina Fofana*, Case No.SCSL-2003-11-PT, Defence Reply to the Prosecution Response to the Additional Written Submission Pertaining to the Preliminary Motion Based on Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 27 January 2004, paras 2-9.

¹³ *Prosecutor v. Moinina Fofana*, Case No.SCSL-2003-11-PT Prosecution Response to the Defence Preliminary Motion Based on Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 21 November 2004 ("Prosecution Response"), paras 3-6.

- that a government cannot grant amnesty for serious violations of crimes under international law¹⁴.
3. The issue raised by the Defence has already been decided upon by this Chamber. In our Decision on the Invalidity of the Agreement on the Establishment of the Special Court in the Gbao case on 25 May 2004, we found that “the establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone.”¹⁵ We also found that “the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community.”¹⁶ We reasoned further that “Article IX of the Lomé Accord cannot constitute a legal bar to the exercise of jurisdiction over international crimes by an international court or a state asserting universal jurisdiction. Equally, it does not constitute a legal bar to the establishment of an international court to try crimes against humanity.”¹⁷ We found support for the statement that it is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law.¹⁸ In our Lomé Amnesty Decision, we explained at length why the Lomé Accord “cannot be characterized as an international instrument”.¹⁹
 4. For the reasons given in the Lomé Amnesty Decision and the Decision on the Invalidity of the Agreement on the Establishment of the Special Court, the arguments raised by the Defence are rejected.

II. REQUEST FOR AN ORAL HEARING

5. The Appeals Chamber has not found it necessary to hear oral arguments on issues that repeat those decided upon in the Lomé Amnesty Decision and in the Decision on the Invalidity of the Agreement on the Establishment of the Special Court.

¹⁴ Prosecution Response, para. 12.

¹⁵ Para. 5.

¹⁶ Decision on the Invalidity of the Agreement on the Establishment of the Special Court, para. 5.

¹⁷ Decision on the Invalidity of the Agreement on the Establishment of the Special Court, para. 7.

¹⁸ Decision on the Invalidity of the Agreement on the Establishment of the Special Court, para. 9.

¹⁹ Lomé Amnesty Decision, para. 42.

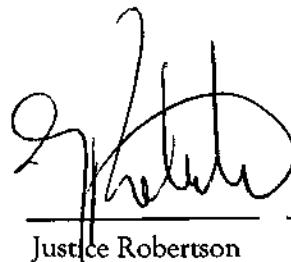
III. DISPOSITION

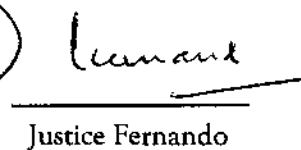
6. For the above-mentioned reasons the Preliminary Motion is dismissed in its entirety.

Done at Freetown this 25th Day of ~~March~~ ^{MAY} 2004


Justice Winter

 
Justice King Justice Ayoola


Justice Robertson


Justice Fernando

Presiding

